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## THE GOVERNMENT BRAND

*Mary-Rose Papandrea*

**ABSTRACT**—In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the U.S. Supreme Court held that Texas could deny the Sons of Confederate Veterans a specialty license plate because the public found the group’s Confederate flag logo offensive. The Court did not reach this conclusion because it deemed the Confederate flag to fall within a category of unprotected speech, such as true threats, incitement, or fighting words; because it revisited its determination in *R.A.V. v. City of St. Paul* that restrictions on hate speech are unconstitutional; because travelers who see the license plates are a “captive audience”; or because Texas had a compelling interest in disassociating itself from a symbol that it regarded as promoting racial discrimination. Instead, the Court held that Texas was entitled to ban Confederate flags because *all* speech appearing on specialty license plates constitutes government speech immune to the usual restrictions of the First Amendment.

This Article dissects *Walker* and its larger significance for the government speech doctrine. This case takes the Court’s growing deference to institutional government actors and puts it on steroids. Relying heavily on a “reasonable person” inquiry, *Walker* suggests that it will frequently be “reasonable” for people to believe that the government has endorsed private speech appearing on public property or spoken by a public employee or student. But under well-established First Amendment principles, the government’s tolerance of private expression is not the same as endorsement. The Article examines the dangerous implications of *Walker* in a wide variety of contexts, from the speech rights of public school students and government employees, to advertisements on public transportation, and to new means of communication.

**AUTHOR**—Professor, University of North Carolina School of Law. Many thanks to the participants in this Symposium as well as UNC’s Summer Supreme Court Series for their thoughtful comments and insights on the topic of this paper. I am also very grateful to Alexander Tsesis for inviting me to participate in this Symposium.

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## INTRODUCTION

The Roberts Court has generally provided robust constitutional protection to offensive speech. This Court has struck down laws restricting “crush” animal videos,<sup>1</sup> the sale of violent video games to children,<sup>2</sup> and dissemination of intentional lies about military honors.<sup>3</sup> It has also defended the right of the hateful Westboro Baptist Church to protest outside a funeral.<sup>4</sup> But in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the Court held that Texas could deny a specialty license plate application to the Sons of Confederate Veterans (SCV) because the public found the group’s Confederate flag logo offensive.<sup>5</sup> The Court did not reach this conclusion because it deemed the Confederate flag to fall within a category of unprotected speech, such as true threats,<sup>6</sup> incitement,<sup>7</sup> or fighting words,<sup>8</sup> because it revisited its determination in *R.A.V. v. City of St. Paul* that restrictions on hate speech are unconstitutional,<sup>9</sup> because travelers who see the license plates are a “captive audience,”<sup>10</sup> or because Texas had a compelling interest in disassociating itself from a symbol that

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<sup>1</sup> United States v. Stevens, 559 U.S. 460, 481–82 (2010).

<sup>2</sup> Brown v. Entm’t Merchs. Ass’n, 131 S. Ct. 2729, 2741–42 (2011).

<sup>3</sup> United States v. Alvarez, 132 S. Ct. 2537, 2551 (2012) (plurality opinion).

<sup>4</sup> Snyder v. Phelps, 562 U.S. 443, 460–61 (2011).

<sup>5</sup> 135 S. Ct. 2239, 2245 (2015).

<sup>6</sup> Virginia v. Black, 538 U.S. 343, 359–60 (2003).

<sup>7</sup> Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

<sup>8</sup> Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

<sup>9</sup> 505 U.S. 377, 391 (1992).

<sup>10</sup> See, e.g., Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (plurality opinion) (noting that advertising on public transportation runs “the risk of imposing upon a captive audience”).

it regarded as promoting racial discrimination.<sup>11</sup> Instead, the Court held that Texas was entitled to ban Confederate flags because *all* speech appearing on specialty license plates constitutes government speech immune to the usual restrictions of the First Amendment.<sup>12</sup>

In his dissent, Justice Alito declared that the majority's "capacious understanding of government speech takes a large and painful bite out of the First Amendment."<sup>13</sup> This bold statement is noteworthy given that Justice Alito does not have a track record as a particularly speech-protective Justice.<sup>14</sup> He is also the author of the majority opinion in *Pleasant Grove City v. Summum*,<sup>15</sup> the case upon which the *Walker* majority purportedly relies.

This Article dissects *Walker* and its larger significance for the government speech doctrine. *Walker* is a potentially explosive decision with even more significant ramifications than Justice Alito contemplated. *Walker*'s expansive view of the government speech doctrine grants state actors broad authority to restrict private speech. This case takes the Court's growing deference to government institutional actors and puts it on steroids, allowing the government to disfavor private speech in the name of protecting its image—its brand—in a wide variety of contexts, from schools to public employment, and to advertisements on municipal transportation to any number of new communications forums.

Part I discusses the brief and troubled history of the government speech doctrine. Part II takes a closer look at the test for government speech the Court embraced in *Walker* and why this test potentially expands the government speech doctrine dramatically. Part III argues that *Walker*'s expansion of the doctrine is disturbing because it potentially permits the government to silence private speakers whenever a reasonable person

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<sup>11</sup> Cf. *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (holding the denial of a tax exemption to a school that practiced race discrimination satisfied strict scrutiny given the government's compelling interest in eradicating racial discrimination in education). Relatedly, the Court did not embrace the suggestion some scholars have made that the government should not be required to provide a platform for hateful speech. See, e.g., Abner S. Greene, *The Government's Ability to Compel and Restrict Speech*, 61 CASE W. RES. L. REV. 1253, 1258 (2011) (arguing government should be able to "set up speech platforms without providing the opportunity for some persons or groups to cause message-based harm to other persons or groups based on race, ethnicity, national origin, religion, gender, sexual orientation, or other characteristics on the basis of which we think it proper to offer people protection").

<sup>12</sup> *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015).

<sup>13</sup> *Id.* at 2255 (Alito, J., dissenting).

<sup>14</sup> See Clay Calvert, *Justice Samuel A. Alito's Lonely War Against Abhorrent, Low-Value Expression: A Malleable First Amendment Philosophy Privileging Subjective Notions of Morality and Merit*, 40 HOFSTRA L. REV. 115, 115–21 (2011).

<sup>15</sup> 555 U.S. 460 (2009).

might believe the government is endorsing that speech. This is because *Walker* suggests that it will frequently be “reasonable” for people to believe that the government has endorsed private speech appearing on public property or spoken by a public employee or student. But the government is not a private entity entitled to protect its brand from dilution. Under well-established First Amendment principles, the government is not permitted to interfere with the speech of private speakers whenever it dislikes their expression. By focusing on whether reasonable observers believe this tolerance operates as endorsement, the Court’s new approach to the government speech doctrine threatens the future of free speech rights in this country. Part III examines the dangerous implications of *Walker* in a wide variety of contexts, from student speech rights to government employees to advertisements on public transportation.

### I. A BRIEF AND TROUBLED HISTORY

The First Amendment does not restrict the government’s ability to speak.<sup>16</sup> After all, “[i]t is not easy to imagine how government could function if it lacked th[e] freedom’ to select the messages it wishes to convey.”<sup>17</sup> For example, a government program encouraging vaccinations or recycling should not be required to discourage people from those things.<sup>18</sup> The First Amendment does not serve as a “check” on the government’s expression; ballot box accountability does.<sup>19</sup>

It is hardly controversial that the government must speak to be effective and that it need not embrace opposing viewpoints whenever it does. The real crux of the problem, however, is determining when in fact the government is speaking.<sup>20</sup> This Part sketches the brief and troubled history of the Court’s government speech doctrine and then turns to outline the pre-*Walker* dispute in the lower courts about how to deal with license plates and other cases where government and private speech are arguably intertwined.

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<sup>16</sup> *Walker*, 135 S. Ct. at 2245–46.

<sup>17</sup> *Id.* at 2246 (quoting *Summum*, 555 U.S. at 468).

<sup>18</sup> See *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2332 (2013) (Scalia, J., dissenting) (“The First Amendment does not mandate a viewpoint-neutral government. Government must choose between rival ideas and adopt some as its own: competition over cartels, solar energy over coal, weapon development over disarmament, and so forth. Moreover, the government may enlist the assistance of those who believe in its ideas to carry them to fruition; and it need not enlist for that purpose those who oppose or do not support the ideas.”).

<sup>19</sup> *Walker*, 135 S. Ct. at 2245–46.

<sup>20</sup> See *Summum*, 555 U.S. at 470 (“There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech . . .”).

### A. *From Rust to Open Society*

The Court has struggled to determine what constitutes government speech in a variety of contexts, and the result is a hodgepodge of cases lacking coherence.

The Court has suggested that the government speech doctrine is potentially implicated in five general contexts: (1) the government using third parties to express a specific, substantive government policy;<sup>21</sup> (2) government programs that condition the receipt of federal funds on the forfeiture of speech rights;<sup>22</sup> (3) the administration of a government program that inherently requires selective discretion, such as those involving the arts,<sup>23</sup> libraries,<sup>24</sup> or television broadcasts;<sup>25</sup> (4) the apparent government endorsement of private speech;<sup>26</sup> and (5) restrictions on government employee speech.<sup>27</sup> Restrictions on expressive speech in public schools that “students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school” also rest on the government speech doctrine, although the Court has not been explicit about this.<sup>28</sup> This taxonomy is not rigid; “the typologies do not arise in isolation, but instead often interact with one another.”<sup>29</sup> For example, the line between using third parties to express the government’s message and the conditioning of subsidies on the forfeiture of other constitutional rights is

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<sup>21</sup> *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 557–67 (2005) (rejecting challenge to government advertisement promoting beef consumption which was funded by individual beef producers).

<sup>22</sup> *All. for Open Soc’y Int’l, Inc.*, 133 S. Ct. at 2330; *Rust v. Sullivan*, 500 U.S. 173, 196 (1991).

<sup>23</sup> *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 580–90 (1998) (rejecting challenge to “decency” restriction on government arts funding).

<sup>24</sup> *United States v. Am. Library Ass’n*, 539 U.S. 194, 205 (2003) (plurality opinion) (noting public libraries “necessarily consider content in making collection decisions and enjoy broad discretion in making them”).

<sup>25</sup> *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673 (1998) (finding that public television broadcasters necessarily exercise editorial discretion).

<sup>26</sup> *See Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009).

<sup>27</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that the First Amendment does not protect a government employee speaking within the scope of his job responsibilities).

<sup>28</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). The articulated basis for this decision was not the government speech doctrine, which had not been recognized at that point, but rather the importance of deferring to the importance of controlling speech as part of the educational process. *Id.* at 270–73. At the same time, the Court did state that preexisting First Amendment principles did not provide the appropriate standard “for determining when a school may refuse to lend its name and resources to the dissemination of student expression,” *id.* at 272–73, which sounds a lot like the government speech doctrine. Indeed, the Court has subsequently suggested that *Hazelwood* involves the government’s own speech. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995) (citing *Hazelwood* as an example of a case involving the government’s own speech).

<sup>29</sup> Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1384 (2001).

hardly a bright one.<sup>30</sup> Similarly, the explicit or implicit endorsement of private speech can arguably involve some sort of government subsidy; in some cases, the endorsement is arguably classifiable as the government itself speaking through third parties. Restrictions on government employee speech might be regarded as equivalent to the government's right to control subsidized speech.

The government speech doctrine permits the government to do what it otherwise would not be able to do. Under current First Amendment doctrine, the government may not favor or disfavor speakers on the basis of the content of their messages.<sup>31</sup> Viewpoint-based speech restrictions are a particularly "egregious form of content discrimination"<sup>32</sup> because they "raise[] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."<sup>33</sup> The presumption that viewpoint-based speech restrictions are unconstitutional applies even when the government has created a forum for private expression.<sup>34</sup>

The government speech doctrine and the public forum doctrine often exist in tension with each other.<sup>35</sup> The Court was asked to choose between the government speech doctrine and the public forum doctrine in *Pleasant Grove City v. Summum*.<sup>36</sup> In this case, the Court had to determine whether a city was entitled to make content-based determinations about which monuments to accept for permanent display in its park.<sup>37</sup> In determining that permanent monuments represent government speech, the Court seemed to return to an argument it had long rejected: namely, that the government has a right to control its property the same way that private property owners do.<sup>38</sup> In addition, the Court rejected arguments that the government speech

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<sup>30</sup> See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 196 (1991).

<sup>31</sup> *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

<sup>32</sup> *Id.* at 2230 (quoting *Rosenberger*, 515 U.S. at 829).

<sup>33</sup> *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

<sup>34</sup> See *Rosenberger*, 515 U.S. at 836–37 (holding a university could not discriminate on the basis of viewpoint when distributing student activity funds).

<sup>35</sup> The Court recognized this tension as early as *Rust v. Sullivan*, 500 U.S. at 199–200 ("[T]he existence of a Government 'subsidy,' in the form of Government-owned property, does not justify the restriction of speech in areas that have 'been traditionally open to the public for expressive activity,' or have been 'expressly dedicated to speech activity.'" (citations omitted) (first quoting *United States v. Kokinda*, 497 U.S. 720, 726 (1990) (plurality opinion); then citing *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.); then quoting *Kokinda*, 497 U.S. at 726 (plurality opinion); and then citing *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

<sup>36</sup> 555 U.S. 460 (2009).

<sup>37</sup> *Id.* at 464–66.

<sup>38</sup> See *id.* at 470–71 (equating the government with private property owners).

doctrine should require the city to pass a resolution formally adopting the monument as its own and articulating what message it is trying to communicate.<sup>39</sup> The Court reasoned that any formal adoption requirement “would be a pointless exercise” because placing the monument in the park is sufficient to put people on notice that it is endorsing it.<sup>40</sup> Requiring a specific message, the Court contended, “fundamentally misunderstands the way monuments convey meaning.”<sup>41</sup>

Scholars have criticized *Summum* for the Court’s failure to require more from the government before permitting it to receive the benefit of the government speech doctrine. As Helen Norton and others have argued, failing to require the government to be transparent about when it is speaking undermines the possibility of political accountability.<sup>42</sup> Others have argued that this failure can potentially lead to the government “using the government speech doctrine as a cloak” for “misconduct.”<sup>43</sup>

*Summum* set a very low bar for the application of the government speech doctrine. If the principles of that case are generally applicable to all cases where the government asserts a government speech doctrine defense, the government does not have to develop the message; the government does not have to formally adopt the message; the government does not even have to clearly say anything. All that *Summum* seems to require is that the government exercise final approval authority over expression on its property. Although the Court emphasized how different permanent monuments are from more temporary displays, the threat to the public

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<sup>39</sup> *Id.* at 473–74.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 474.

<sup>42</sup> Helen Norton, *The Measure of Government Speech: Identifying Expression’s Source*, 88 B.U. L. REV. 587, 599 (2008) (“[T]he government can establish its entitlement to the government speech defense only when it establishes itself as the source of that expression both as a formal and as a functional matter.” (emphasis omitted)); see also, e.g., Bezanson & Buss, *supra* note 29, at 1510 (“[G]overnment should be able to act as a speaker only when it does so purposefully, with an identified message, which is reasonably understood by those receiving it to be the government’s message.”); Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 615 (2008) (“[O]ne of the problems posed by mixed speech is the risk that the public will not spot government advocacy and will therefore fail to hold the government accountable for its viewpoint.”); Leslie Gielow Jacobs, *Who’s Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35, 57 (2002) (“[A]ccountability depends most fundamentally upon the government adequately informing the citizenry of the fact that it is speaking when it engages in a government/private speech interaction.”).

<sup>43</sup> Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1302 (2010); see also Bezanson & Buss, *supra* note 29, at 1510–11 (“Without the limiting rules of purpose, message, and receipt, the government’s speech prerogative could permit the government after the fact to claim that any action is expressive, and subject to different criteria than those applied to instances of government regulation.”).

forum doctrine—and to the rest of the robust protections for free speech that the First Amendment otherwise usually provides—is obvious.<sup>44</sup>

Of course, if one is not a fan of the public forum doctrine, this threat might not be much of a concern. It is possible to see this disdain for the public forum doctrine in Justice Breyer's *Summum* concurrence. Justice Breyer—who went on to author the majority opinion in *Walker*—wrote separately in *Summum* to make clear he was uncomfortable with the “jurisprudence of labels” that the First Amendment had become.<sup>45</sup> He argued that excluding Summum's proffered monument “does not disproportionately restrict Summum's freedom of expression” given the group's ability to express itself in other ways, the “impracticality of alternatives,” and “the City's legitimate needs” to “use park space to further a variety of recreational, historical, educational, esthetic, and other civic interests.”<sup>46</sup>

As Justice Breyer's *Summum* concurrence suggests, the Court has sometimes embraced the government speech doctrine to resolve tricky problems. Once the Court determines the case before it involves government speech, First Amendment claims dissolve like magic. In various cases, the Court has rejected the application of the public forum doctrine because it would lead to what the Court believes would be unworkable results.<sup>47</sup> Indeed, the popular perception of *Summum* as an easy case may come not from the clarity of the Court's reasoning but rather from an awareness of the implications of a contrary ruling.<sup>48</sup> This kind of

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<sup>44</sup> The Court has described a public park as a “quintessential” public forum. *See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

<sup>45</sup> *Summum*, 555 U.S. at 484 (Breyer, J., concurring) (citing *United States v. Kokinda*, 497 U.S. 720, 740–43 (1990) (Brennan, J., dissenting)).

<sup>46</sup> *Id.* at 484–85. Justice Breyer has recognized the usefulness of the government speech doctrine before. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 569 (2005) (Breyer, J., concurring) (“Now that we have had an opportunity to consider the ‘government speech’ theory, I accept it as a solution to the problem presented by these cases.”). This is not inconsistent with Justice Breyer's general willingness to jettison the First Amendment jurisprudence in favor of a case-by-case proportionality inquiry.

<sup>47</sup> *See, e.g., Summum*, 555 U.S. at 480; *United States v. Am. Library Ass'n*, 539 U.S. 194, 205 (2003) (plurality opinion) (finding forum analysis “incompatible with the discretion that public libraries must have to fulfill their traditional missions”).

<sup>48</sup> Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 915 (2010) (declaring that *Summum* was an easy case for deciding government speech but also recognizing that “[p]erhaps *Summum* was unanimous because the objectionable consequences of a contrary ruling were so clear as a pragmatic matter”). Of course not everyone thinks *Summum* was decided correctly. *See, e.g., Gey, supra* note 43, at 1302 (criticizing *Summum* as “[s]loppy, and ultimately incoherent”).



pragmatism appears sometimes in the Court's speech decisions,<sup>49</sup> albeit inconsistently.<sup>50</sup>

The government has not always prevailed when it has argued that it should be permitted to make viewpoint-based determinations about who can use its property—whether in the form of land or subsidy or some other benefit—to speak. In fact, attempts to expand or at least solidify the government speech doctrine have suffered two notable defeats in recent years. In *Agency for International Development v. Alliance for Open Society International, Inc.*, the Court declared that the government may not condition the receipt of subsidies unless those subsidies serve the purposes of the program.<sup>51</sup> In that particular case, the Court held that conditioning the receipt of funds to fight HIV/AIDS on having an organizational policy against prostitution and sex trafficking was unconstitutional.<sup>52</sup> The Court rejected Justice Scalia's more expansive approach that would invalidate only those conditions that are coercive or not relevant to the contours of the federal program.<sup>53</sup> The Court concluded it was "confident that the Policy Requirement [fell] on the unconstitutional side of the line" because it was not necessary to the program to require funding recipients to adopt a negative stance towards prostitution and sex trafficking.<sup>54</sup> The Court also rejected the government's argument that groups that did not honor the requirement would "undermine the government's program and confuse its message opposing prostitution and sex trafficking."<sup>55</sup> The Court admitted that the distinction "between conditions that define the federal program and those that reach outside it . . . is not always self-evident."<sup>56</sup>

In *Lane v. Franks*, the Court limited the scope of the government's power to restrict the speech of its employees.<sup>57</sup> In this case, a former government employee alleged he suffered retaliation for testifying at a

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<sup>49</sup> See, e.g., *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 680 (1998) (explaining that the Court's different treatment of designated public forums and nonpublic forums "encourage[s] the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all").

<sup>50</sup> *Norton & Citron*, *supra* note 48, at 915–16.

<sup>51</sup> 133 S. Ct. 2321, 2330–32 (2013).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 2328.

<sup>54</sup> *Id.* at 2330–32.

<sup>55</sup> *Id.* at 2331–32 (quoting Brief for the Petitioners at 37, *All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321 (No. 12-10), 2013 WL 701226, at \*37).

<sup>56</sup> *Id.* at 2330. Reconciling this decision with *Rust*, which forbade doctors from mentioning abortion at all to their patients, is not easy.

<sup>57</sup> 134 S. Ct. 2369, 2374–75 (2014). The Court explicitly did not address whether the First Amendment would protect an employee who testified as part of his job duties. *Id.* at 2378 n.4.

corruption trial.<sup>58</sup> The Court held that the First Amendment protected the employee's right to testify on a matter of public concern, even when the subject of his testimony involves information he learned during the course of his employment.<sup>59</sup> Prior to *Lane*, the Court's decision in *Garcetti v. Ceballos* had left unclear whether the First Amendment would protect public employees in such circumstances.<sup>60</sup>

Strictly speaking, neither *Open Society* nor *Lane* directly provides guidance regarding how courts should choose between the public forum doctrine and the government speech doctrine. After all, one case concerns the constitutionality of government limits on subsidy programs, and the other concerns the constitutional rights of government employees; the public forum was inapposite to both. Nevertheless, because both cases rejected arguments in favor of the government speech doctrine, they potentially suggest that the doctrine should not apply when the speech restriction (or compulsion) does not serve a programmatic purpose, or at least when the government does not have a good reason for censoring or compelling private speech.

#### B. License Plates

The power of states to control the messages that appear on license plates has been a hotly debated issue for decades. This debate first began in the context of determining whether the government could force car owners to post its own messages on their cars; more recently, the debate has focused on First Amendment challenges to the optional specialty and vanity license plates states offer for an additional fee.

The debate over license plates began almost forty years ago in *Wooley v. Maynard*, where the Court held that individuals could not be compelled to affix to their car a license plate proclaiming New Hampshire's motto "Live Free or Die."<sup>61</sup> Significantly, the Court did not address the state's argument that no one would believe car operators affirmed the motto simply by affixing the plate to their vehicle because everyone knows that the state prescribed the format and content of the required license plates.<sup>62</sup>

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<sup>58</sup> *Id.* at 2375–76.

<sup>59</sup> *Id.* at 2378.

<sup>60</sup> *Garcetti* held that the First Amendment does not restrict the government's ability to control speech that "owes its existence to a public employee's professional responsibilities." 547 U.S. 410, 421–22 (2006). *Lane* made clear that "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech." 134 S. Ct. at 2379.

<sup>61</sup> 430 U.S. 705, 713 (1977).

<sup>62</sup> *Id.* at 720–21 (Rehnquist, J., dissenting) ("The issue, unfronted by the Court, is whether appellees, in displaying, as they are required to do, state license tags, the format of which is known to

The Court did not consider whether the motto or anything else on a license plate constituted government speech because the Court had not yet recognized the government speech doctrine, and New Hampshire did not make any such argument.

Indeed, customized license plates were not likely on the Court's mind forty years ago because they were not in widespread existence at that point. Most states did not begin earning revenue from specialty license plates until the late 1980s, when the public sympathies for the Challenger explosion prompted the creation of a commemorative Challenger license plate.<sup>63</sup> Since that time, specialty license plates have turned into big business.<sup>64</sup> Texas's program brings in millions of dollars each year.<sup>65</sup> The precise contours of each state's license plate program can vary, but the three programs Texas has are representative. In one Texas program, the state legislature itself has selected a limited number of mottos.<sup>66</sup> A second Texas program permits private individuals and organizations to request specialty plates through a "state-designated private vendor," typically for promotional or commercial purposes.<sup>67</sup> These first two programs were not at issue in *Walker*. Instead, the Court was asked to consider the constitutionality of a program permitting the Board of the Texas Department of Motor Vehicles to "create new specialty license plates on its own initiative or on receipt of an application from a nonprofit entity seeking to sponsor a specialty plate."<sup>68</sup> Nonprofits must include "a draft design of the specialty license plate" in their application.<sup>69</sup> The Board has been delegated authority to approve applications and is permitted to refuse to create a plate "if the design might be offensive to any member of the public . . . or for any other reason established by rule."<sup>70</sup> In *Walker*, the

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all as having been prescribed by the State, would be considered to be advocating political or ideological views.").

<sup>63</sup> Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419, 424 (2001).

<sup>64</sup> See *id.*; *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2261–62 (2015) (Alito, J., dissenting) (noting that specialty license plate programs have been adopted by many states "because they bring in money").

<sup>65</sup> *Walker*, 135 S. Ct. at 2261–62 (Alito, J., dissenting).

<sup>66</sup> *Id.* at 2244 (describing Texas's program and offering "Keep Texas Beautiful," "Mothers Against Drunk Driving," and "Fight Terrorism" as example plates (quoting TEX. TRANSP. CODE ANN. §§ 504.602, 504.608, 504.647 (West 2013))).

<sup>67</sup> See *id.* (first citing TEX. TRANSP. CODE ANN. § 504.6011(a); then citing § 504.851(a); and then citing 43 TEX. ADMIN. CODE § 217.52(b) (2015)) (offering "Keller Indians" and "Get it Sold with RE/MAX" as examples). These plates are approved by the Board of the Texas Department of Motor Vehicles. *Id.*

<sup>68</sup> *Id.* (quoting TEX. TRANSP. CODE ANN. § 504.801(a); and then citing § 504.801(b)).

<sup>69</sup> *Id.* (quoting 43 TEX. ADMIN. CODE § 217.45(i)(2)(C)).

<sup>70</sup> *Id.* at 2244–45 (quoting TEX. TRANSP. CODE ANN. § 504.801(c)).

Board rejected a proposed plate design submitted by the Sons of Confederate Veterans because it contained a Confederate flag in its logo.<sup>71</sup> The Board rejected the plate as “offensive” because, it concluded, the public associates the flag “with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups.”<sup>72</sup>

Prior to *Walker*, courts and commentators had disagreed whether specialty license plate programs in various states constitute a “limited public forum,” “nonpublic forum,” government speech, or some form of “hybrid” public and private speech.<sup>73</sup> Other moneymaking schemes, such as adopt-a-highway programs<sup>74</sup> and sponsorship of public radio,<sup>75</sup> had faced similar challenges and scrutiny. As this debate swirled, the Court continued its struggle, in fits and starts, to define the government speech doctrine.

In the many license plate cases decided before *Summum*, lower courts frequently applied a four-factor test to determine what constitutes government speech:

- (1) the central purpose of the program in which the speech in question occurs;
- (2) the degree of editorial control exercised by the government or private entities over the content of the speech; (3) the identity of the literal speaker;

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<sup>71</sup> *Id.* at 2243–44.

<sup>72</sup> *Id.* at 2245 (quoting Resolution Denying Sons of the Confederate Veterans Specialty License Plate Application, Joint Appendix at 64–65, *Walker*, 135 S. Ct. 2239 (No. 14-144), 2014 WL 7498018, at \*65).

<sup>73</sup> Courts have reached varying conclusions on categorizing specialty license plates. *See, e.g.*, *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 971 (9th Cir. 2008) (concluding specialty license plates were a limited public forum); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 865 (7th Cir. 2008) (specialty license plates are a nonpublic forum); *ACLU of Tenn. v. Bredeisen*, 441 F.3d 370, 377–80 (6th Cir. 2006) (holding forum analysis did not apply to specialty license plates because they constitute government speech); *Sons of Confederate Veterans, Inc. v. Glendening*, 954 F. Supp. 1099, 1100, 1105 (D. Md. 1997) (holding Maryland violated the First Amendment by refusing to issue license plates with a Confederate flag); *Pruitt v. Wilder*, 840 F. Supp. 414, 417 (E.D. Va. 1994) (holding ban on reference to deities on specialty license plates violates the First Amendment). Scholars similarly classify specialty license plates as government speech, private speech, or some combination of the two. *See, e.g.*, Corbin, *supra* note 42, at 619 (“Messages on specialty license plates are a paradigmatic example of speech with both private and governmental speakers.”); Scott W. Gaylord, “*Kill the Sea Turtles*” and *Other Things You Can’t Make the Government Say*, 71 WASH. & LEE L. REV. 93, 94 (2014) (arguing that license plates are government speech because states exercise ultimate control over their content); Jacobs, *supra* note 63, at 423 (arguing “that specialty plate programs are private speech forums,” and noting that many such programs are unconstitutional).

<sup>74</sup> *See, e.g.*, *Robb v. Hungerbeeler*, 370 F.3d 735 (8th Cir. 2004).

<sup>75</sup> *See, e.g.*, *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000).

and (4) whether the government or the private entity bears the ultimate responsibility for the content of the speech.<sup>76</sup>

Courts generally did not offer a theoretical justification for why any or all of these factors were important,<sup>77</sup> but over the course of time, some lower courts expressed the view that these factors could be summarized more simply as an inquiry into whether a reasonable observer would regard the expression as government speech.<sup>78</sup> A marked minority of courts and commentators focused much less or not at all on what a reasonable observer would believe and claimed ultimate government control over the speech was the central concern of the doctrine.<sup>79</sup>

Many lower courts held that state specialty license plate programs (or related vanity license plate programs) are most appropriately analyzed as limited public or nonpublic forums in which viewpoint-based distinctions are impermissible. Those concluding that a specialty license plate program creates a nonpublic forum have sometimes held that the government nevertheless has the power to make speech restrictions that are “reasonable” given the purpose of the forum. Specifically, some courts have held that states can exclude an entire subject area from specialty license plates, particularly when that subject area is controversial.<sup>80</sup> The Seventh Circuit, for example, held that the Illinois specialty license plate program was a nonpublic forum, but “[t]o the extent that messages on

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<sup>76</sup> *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 792–93 (4th Cir. 2006) (quoting *Sons of Confederate Veterans v. Comm’r of Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002)); see also *Ariz. Life Coal.*, 515 F.3d at 964–65 (adopting the Fourth Circuit’s test in the license plate context). Many other circuits have relied on these factors in other speech contexts. See, e.g., *Knights of the Ku Klux Klan*, 203 F.3d at 1093–94 (public broadcasting); *Wells v. City and Cty. of Denver*, 257 F.3d 1132, 1140–41 (10th Cir. 2001) (city holiday display).

<sup>77</sup> See Norton, *supra* note 42, at 598 (“While courts applying any or all of these factors have yet to identify their underlying theoretical justification, these considerations appear to reflect courts’ intuitive yet not-fully-articulated sense of the need to insist on a clearly governmental source to ensure that government can be held accountable for the speech it claims as its own.” (footnote omitted)).

<sup>78</sup> See, e.g., *Children First Found., Inc. v. Fiala*, 790 F.3d 328, 338 (2d Cir.) (“Considering the emphasis on context and the public’s perception of the speaker’s identity in *Summum*, we think the proper inquiry here is ‘whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige.’” (quoting *Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388, 394 (5th Cir. 2014), *rev’d sub nom. Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015))), *opinion withdrawn and superseded on reh’g in part*, 611 F. App’x 741 (2d Cir. 2015); see also Norton & Citron, *supra* note 48, at 917 (noting that over time circuit courts came to “more helpfully explain [the four] factors as proxies for determining a reasonable onlooker’s attribution of the speech to the government or private parties”).

<sup>79</sup> See, e.g., *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 375–77 (6th Cir. 2006) (finding that government control is the central inquiry); Gaylord, *supra* note 73, at 126–32 (arguing that a government control standard is controlling after *Summum* and *Johanns*).

<sup>80</sup> See, e.g., *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 865–67 (7th Cir. 2008).

specialty license plates are regarded as approved by the State, it is reasonable for the State to maintain a position of neutrality on the subject of abortion.”<sup>81</sup> Similarly, the Second Circuit held just one month before *Walker* that New York did not have to issue a “Choose Life” plate because such an issue is “so incredibly divisive.”<sup>82</sup>

In *Walker*, the Court held that the specialty license plates were government speech and that the public forum doctrine was inapplicable.<sup>83</sup> Without even mentioning that scholars and courts had struggled to determine the correct approach for analyzing First Amendment challenges to specialty license plates, the majority declared that the following three factors were relevant: (1) the history of license plates; (2) the reasonable observer test; and (3) the government’s control over the content of license plates.<sup>84</sup> As discussed in greater detail in Part II, the dissent disagreed with the Court’s analysis of all three of these factors and took issue with its failure to consider other relevant factors.

Because the majority concluded that the Texas plates are government speech, it did not have to address Texas’s argument that its decision to reject a plate with a Confederate flag did not constitute viewpoint-based discrimination. The dissenters did, however, and rejected it out of hand. The dissenters first drew a parallel to an approved plate design, the Buffalo Soldiers plate, which was intended to honor soldiers.<sup>85</sup> They argued that the SCV supporters also claimed their plate was intended to honor soldiers, and that it was inconsistent to approve one and reject the other.<sup>86</sup> The dissenters

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<sup>81</sup> *Id.* at 866. Relatedly, some courts have held states do not have to issue vanity license plates that are offensive, provided that the determination of offensiveness is viewpoint neutral. *See, e.g.,* Perry v. McDonald, 280 F.3d 159, 175 (2d Cir. 2001) (upholding Vermont’s restriction on scatological terms on vanity plates as viewpoint neutral and reasonable). *But see* Montenegro v. N.H. Div. of Motor Vehicles, 93 A.3d 290, 298 (N.H. 2014) (finding the denial of “offensive” vanity plates unconstitutional under New Hampshire constitution). Arguably vanity plates are even more obviously private speech, given that they are unique vehicle identifiers an individual driver requests, rather than mass-produced license plates. *See* Norton, *supra* note 42, at 618–19 (noting that vanity license plates and the U.S. government’s “vanity stamp program” potentially implicate private speech because “the government can disavow formal authorship”). Since *Walker*, lower courts have addressed whether vanity plates are government speech, with mixed results. *Compare* Mitchell v. Md. Motor Vehicle Admin., 126 A.3d 165, 184–88 (Md. Ct. Spec. App. 2015) (holding vanity plates are not government speech), *with* Comm’r of the Ind. Bureau of Motor Vehicles v. Vawter, 45 N.E.3d 1200, 1204–07 (Ind. 2015) (holding vanity plates are government speech).

<sup>82</sup> *Fiala*, 790 F.3d at 342, 352 (2d Cir. 2015) (quoting Deposition of Jill Dunn, Joint Appendix at 1364, *Fiala*, 790 F.3d 328 (No. 11-5199)) (holding specialty license plate program created a nonpublic forum and that the decision to reject the “Choose Life” plate was viewpoint neutral).

<sup>83</sup> *Walker*, 135 S. Ct. at 2251–53.

<sup>84</sup> *Id.* at 2251.

<sup>85</sup> *Id.* at 2262 (Alito, J., dissenting).

<sup>86</sup> *Id.*

also went on to reject Texas's argument that its decision was constitutional because the SCV plate was rejected not because of its message but because the Board was worried about driver distraction or road rage that could undermine safety.<sup>87</sup> They pointed out that Texas had failed to present any evidence to support this claim, and that it had failed to ban Confederate flag bumper stickers.<sup>88</sup>

## II. A CLOSE LOOK AT *WALKER*

In *Walker*, Justice Breyer, writing for the majority, candidly uses the government speech doctrine as a convenient solution for what he regards as an otherwise tricky problem. Although it appears that Justice Breyer's approach is not far different from the proportionality or balancing approach he has advocated in a number of cases,<sup>89</sup> his majority opinion in *Walker* announces what appears to be a new three-part test for government speech. Determining whether private speech is actually government speech requires an inquiry into three factors: (1) the history of the program at issue; (2) the understanding of a reasonable person; and (3) whether the government has ultimate control over the content of the speech. This test contains various elements the Court had mentioned before in its First Amendment cases, but the Court had never used them all together as a way of defining

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<sup>87</sup> *Id.* at 2263.

<sup>88</sup> *Id.* Arguments about the need to censor controversial political speech have been made in public transit advertising cases. *See, e.g.,* Seattle MidEast Awareness Campaign v. King Cty., 781 F.3d 489, 499–503 (9th Cir. 2015) (holding that public transit advertising constituted a limited public forum and the rejection of a controversial political advertisement about the Israeli–Palestinian conflict was reasonable and viewpoint neutral because the government made a reasonable forecast of substantial disruption and rejected all advertisements on either side of that topic). In *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 70 F. Supp. 3d 572 (S.D.N.Y.), *vacated*, 109 F. Supp. 3d 626 (S.D.N.Y. 2015), Judge Koeltl rejected claims that accepting a controversial political advertisement would lead to violence, stating, “the defendants underestimate the tolerant quality of New Yorkers and overestimate the potential impact of these fleeting advertisements.” *Id.* at 583.

<sup>89</sup> *See, e.g.,* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring) (“The First Amendment requires greater judicial sensitivity both to the Amendment’s expressive objectives and to the public’s legitimate need for regulation than a simple recitation of categories . . . .”); District of Columbia v. Heller, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting) (noting that he would adopt “an interest-balancing inquiry” for assessing gun regulations); Van Orden v. Perry, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in the judgment) (“I see no test-related substitute for the exercise of legal judgment.”); Thompson v. W. States Med. Ctr., 535 U.S. 357, 388–89 (2002) (Breyer, J., dissenting) (criticizing the majority’s strict application of the commercial speech doctrine and arguing that “the Constitution demands a more lenient application, an application that reflects the need for distinctions among contexts, forms of regulation, and forms of speech”); Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) (explaining that when “a law significantly implicates competing constitutionally protected interests in complex ways,” the Court should consider whether the burden of the law is proportional to the government interest).

government speech. Each prong of the test is deeply problematic, particularly in the way in which the Court applied them in *Walker*.

### A. History

In *Summum*, the Court relied on the longstanding historical tradition of governments using monuments to communicate, whether the government has commissioned and financed the construction of those monuments or accepted monuments donated by private groups.<sup>90</sup> In *Walker*, the majority contends that history similarly indicates that states are speaking through license plates because they have long used license plates not just to identify vehicles but also to communicate messages.<sup>91</sup>

Before criticizing the majority's warped view of the history of messaging on license plates, it is worth noting how interesting it is that the four progressive Justices on the Court rely on history for the interpretation of the scope of First Amendment rights. Although history has lately played a more central role in the Court's jurisprudence in cases like *United States v. Stevens* and *Brown v. Entertainment Merchants Ass'n*, the Court's reliance on history in those cases is hardly free from controversy.<sup>92</sup> If the Court consistently relied on history, it would be forced to roll back protections it has extended for all sorts of speech that were traditionally unprotected (or at least not clearly protected), and perhaps extend protections to speech that the Court has excluded, such as obscenity. In addition, the "liberal" wing of the Court has generally rejected arguments that history and tradition should be used to define what is a public forum.<sup>93</sup>

Certainly the explicit consideration of history could be useful in defining government speech, but such an inquiry is troublesome in many ways. Locating the relevant historical tradition is often difficult.<sup>94</sup> The

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<sup>90</sup> *Pleasant Grove City v. Summum*, 555 U.S. 460, 470–71 (2009).

<sup>91</sup> *Walker*, 135 S. Ct. at 2248 ("States have used license plate slogans to urge action, to promote tourism, and to tout local industries.").

<sup>92</sup> See, e.g., Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 398–401 (2014) (criticizing the historical framework advanced in *Stevens*).

<sup>93</sup> See, e.g., *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 694–95 (1992) (Kennedy, J., concurring in the judgments) (arguing that history and tradition should not be determinative factors for deciding what constitutes a public forum because asking whether the public property is one that has had as "a principal purpose . . . the free exchange of ideas" . . . leaves the government with almost unlimited authority to restrict speech on its property" (internal citations omitted)).

<sup>94</sup> The Justices frequently debate history in constitutional law cases, and increasingly history is playing an important role in First Amendment speech cases as well. See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2544–47 (2012) (plurality opinion) (finding no historical basis for excluding false speech from First Amendment protection); *id.* at 2557–63 (Alito, J., dissenting) (citing a history of protecting military honors and punishing false speech); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct.



history of government regulation of a forum is most useful to prevent the government from taking over a forum that has been traditionally open to a variety of viewpoints—like streets, parks, and sidewalks. In addition, when the government deviates from a long history of permissiveness to restrict a certain viewpoint, a historical inquiry can suggest the true motivation for the restriction is hostility to that speech, rather than an intent to use the forum to promote a government message.<sup>95</sup> It is unclear, however, how this historical inquiry would function in cases involving new communications platforms, like social media. A lack of history could undermine perfectly legitimate government efforts to control communications in new forums.<sup>96</sup> On the other hand, the inability of plaintiffs to point to a history of openness in these new communications forums would potentially give the government a free pass to engage in viewpoint-based discrimination.<sup>97</sup>

Justice Breyer's historical analysis demonstrates how easily history can be manipulated to support a finding of government speech. Justice Breyer concludes that "the history of license plates shows that . . . they long have communicated messages from the States."<sup>98</sup> Justice Breyer fails to recognize the rise of specialty license plates as distinct from the issuance of the first license plate in the early 1900s and the inclusion of state symbols and mottos several years later. Of course license plates are used for identification, and of course states have used license plates to express state pride, but specialty license plates did not become popular until the late

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2729, 2736 n.3 (2011) (finding that historical traditions did not support an exception for violent speech directed at minors); *id.* at 2759 (Thomas, J., dissenting) (arguing historical evidence demonstrates that the First Amendment does not protect "a right to speak to children without going through their parents").

<sup>95</sup> *Cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (noting that a historical inquiry can help reveal invidious discriminatory purpose).

<sup>96</sup> See Charles W. "Rocky" Rhodes, *The First Amendment Structure for Speakers and Speech*, 44 SETON HALL L. REV. 395, 424–25 (2014) ("[The] historical prerequisite would preclude the government from attempting to assert control over existing mediums of communication to immunize itself from compliance with First Amendment limitations."). In one post-*Walker* case, *Mech v. School Board of Palm Beach County*, 806 F.3d 1070 (11th Cir. 2015), the Eleventh Circuit struggled with this historical inquiry and ultimately concluded that "[t]he absence of historical evidence can be overcome by other indicia of government speech." *Id.* at 1075–76. For example, the court explained, "if the School Board posted a message about school closings for inclement weather on Facebook or Twitter, we would have little difficulty classifying the message as government speech, even though social media is a relatively new phenomenon." *Id.* at 1076.

<sup>97</sup> Rhodes, *supra* note 96, at 427–28 (explaining that, under the historical approach, the government can assert tremendous control over new "avenue[s] of communication"). Justice Breyer has not frequently embroiled himself in historical debates before, with the notable exception of *District of Columbia v. Heller*, 554 U.S. 570, 683–87 (2008) (Breyer, J., dissenting).

<sup>98</sup> *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2248 (2015) (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009)).

1980s, when Florida issued a special commemorative Challenger plate.<sup>99</sup> It was not until the 1990s that Texas realized the moneymaking value of license plates and began to issue specialty plates with a small variety of slogans with messages the state has selected.<sup>100</sup> It is not appropriate to equate the history of license plates generally with the much more recent history of specialty plates.

The majority's reliance on history to determine what constitutes government speech is strikingly familiar to the approach it has embraced when determining whether to recognize a new category of unprotected speech. In *Stevens*, for example, the Court rejected the argument that new exceptions to the First Amendment could be created based on a balancing of the benefits and harms of a particular kind of speech;<sup>101</sup> instead, Chief Justice Roberts declared, categorical exceptions must be "historic and traditional."<sup>102</sup> This assertion helped the Court resolve the animal cruelty case, but it fails to explain all of the various existing categories of speech that now receive full or at least partial constitutional protection without even a hint of historic support. As it did in *Stevens*, the Court in *Walker* places great weight on a historical inquiry "without adequately considering the wider, logical, and normative implications of doing [so]."<sup>103</sup> Because *Walker*'s historical analysis is so suspect, it is difficult to know how lower courts are supposed to apply it in the future.

### B. The Reasonable Observer

In *Walker*, the Court makes clear for the first time that the reasonable observer test plays an important role in determining what constitutes government speech. In the face of jeers from the dissent,<sup>104</sup> the majority proclaims that a reasonable observer would associate any speech on a specialty license plate with the state.<sup>105</sup> The Court explains that the reasonable observer would know that license plates are government property even when they are affixed to private vehicles because the government maintains tight control over what can appear on these plates,

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<sup>99</sup> Jacobs, *supra* note 63, at 424.

<sup>100</sup> See *Walker*, 135 S. Ct. at 2257 (Alito, J., dissenting) (summarizing the history of specialty plates in Texas).

<sup>101</sup> *United States v. Stevens*, 559 U.S. 460, 470–72 (2010).

<sup>102</sup> *Id.* at 468 (quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991)).

<sup>103</sup> See Massaro, *supra* note 92, at 400 (discussing the reliance on history in *Stevens*).

<sup>104</sup> *Walker*, 135 S. Ct. at 2255 (Alito, J., dissenting) ("If a car with a plate that says 'Rather Be Golfing' passed by at 8:30 am on a Monday morning, would you think: 'This is the official policy of the State—better to golf than to work?'").

<sup>105</sup> See *id.* at 2249 (majority opinion).

and people pay extra money for specialty plates specifically because they want the government's endorsement.<sup>106</sup> All of these assumptions are questionable.

The Court's decision to embrace a reasonable observer test explicitly is noteworthy. The perception of a reasonable observer played a relatively small and uncertain role in Justice Alito's majority opinion in *Summum*. In that case, the Court's primary emphasis was on the long historical tradition of governments "us[ing] monuments to speak to the public."<sup>107</sup> Justice Alito also recognized, however, the common understanding that property owners do not open up their land for the erection of monuments conveying messages with which they disagree.<sup>108</sup> Accordingly, Justice Alito wrote, "persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf," regardless of whether a "monument is located on private property or on public property."<sup>109</sup> Justice Alito's opinion left open whether he would embrace a reasonable observer test in all government speech cases or simply in contexts that involve the traditional rights of property owners.<sup>110</sup>

It was Justice Souter who argued in his solo concurrence in *Summum* that the reasonable observer inquiry should play a primary role in determining what constitutes government speech.<sup>111</sup> Justice Souter argued the reasonable observer test is appropriate because it is the same test used in Establishment Clause cases.<sup>112</sup> The reasonable observer approach also

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<sup>106</sup> See *id.* at 2248–49.

<sup>107</sup> *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009).

<sup>108</sup> *Id.* at 471.

<sup>109</sup> *Id.*

<sup>110</sup> Justice Alito also mentioned the reasonable observer in response to the argument that the government must have an articulable message whenever it speaks. He asserted that it was not uncommon for reasonable observers to disagree about the message the government wishes to express through permanent monuments. *Id.* at 474 ("[M]onument[s] may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways."); *id.* at 474–75 (noting that certain monuments, like the John Lennon "Imagine" monument in Central Park, "are almost certain to evoke different thoughts and sentiments in the minds of different observers").

<sup>111</sup> *Id.* at 487 (Souter, J., concurring in the judgment) ("[T]he best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land."); see also *Gaylord*, *supra* note 73, at 125 ("[A] majority of the Court has never adopted Justice Souter's proposed [reasonable observer] test.").

<sup>112</sup> *Summum*, 555 U.S. at 487 (Souter, J., concurring in the judgment) (citing *Cty. of Allegheny v. ACLU*, Greater Pittsburgh Chapter, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring in part and concurring in the judgment)). Justice Stevens agreed with Justice Alito's assertion that the reasonable observer would almost always associate a permanent monument on government property with the government. *Id.* at 481–82 (Stevens, J., concurring); see also *Capitol Square Review and Advisory Bd.*

appeared in *Hazelwood School District v. Kuhlmeier*, where the Court permitted a public school to censor speech that “students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”<sup>113</sup> As mentioned earlier, however, the Court has not (yet) explicitly recognized that case as a government speech case.

Under the Establishment Clause’s reasonable observer test, the Court inquires whether reasonable observers would perceive the government to be endorsing religious expression or otherwise “appearing to take a position on questions of religious belief.”<sup>114</sup> The Court has explained that the perception that the government endorses religious speech gives rise to an Establishment Clause violation because “it sends the ancillary message to members of the audience who are [nonadherents] ‘that they are outsiders, not full members of the political community, and an accompanying message to [adherents] that they are insiders, favored members of the political community.’”<sup>115</sup> In the government speech context, the reasonable observer test ideally ensures that the voting public knows that the government is speaking so that political accountability can occur.

Determining exactly who this reasonable observer is and what this person knows, however, is famously controversial.<sup>116</sup> In *Capitol Square Review & Advisory Board v. Pinette*, the Court considered whether it was unconstitutional for a city to prevent the Ku Klux Klan from erecting a

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v. *Pinette*, 515 U.S. 753, 801–02 (1995) (Stevens, J., dissenting) (taking the same approach). Justice Stevens suggested, however, that it might be more accurate to characterize the government’s acceptance of the monument as “an implicit endorsement of the donor’s message.” *Summum*, 555 U.S. at 481 (Stevens, J., concurring).

<sup>113</sup> 484 U.S. 260, 271–73 (1988).

<sup>114</sup> *Allegheny*, 492 U.S. at 594, 620. A reasonable observer inquiry is also used in other areas of the law, including trademark and copyright infringement. Determining what this reasonable ordinary observer knows or understands is not always easy. See Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251, 1258–60 (2014) (discussing how difficult it can be for juries to put themselves in the position of “actual consumers” to determine whether they would be confused between the defendant’s and plaintiff’s products); see *id.* at 1273 (“Copyright law’s use of varied infringement audiences is confused and often depends on the particular circuit deciding the case.”). In addition, at least one study has demonstrated that in most trademark infringement cases, other factors—such as the proximity of goods, similarity of marks, and the defendant’s intent—play a larger role than actual consumer confusion in determining whether there is trademark infringement. See Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581, 1600 (2006).

<sup>115</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000) (citing *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

<sup>116</sup> See, e.g., William P. Marshall, “We Know It When We See It”: *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 533–37 (1986); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 291–95 (1987).

large cross in a public square in front of the statehouse.<sup>117</sup> In her concurrence, Justice O'Connor described the reasonable observer as "a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share."<sup>118</sup> This person "must be deemed aware of the history and context of the community and forum in which the religious display appears," as well as "the general history of the place in which the cross is displayed."<sup>119</sup> According to Justice O'Connor, this bar is not too high, as any "informed member of the community will know how the public space in question has been used in the past."<sup>120</sup> In dissent, Justice Stevens criticized Justice O'Connor's approach for imagining "a well-schooled jurist, a being finer than the tort-law model."<sup>121</sup> Instead, Justice Stevens would consider the perspective of a reasonable person passing by the monument.<sup>122</sup> More recently, the Court has leaned towards Justice O'Connor's view. In *McCreary County v. ACLU of Kentucky*, the Court stated that the reasonable observer is familiar with context and history; he is not "an absentminded objective observer."<sup>123</sup>

One puzzle of the reasonable observer inquiry is whether that reasonable observer knows the true legislative purpose behind the challenged government action.<sup>124</sup> If the reasonable observer is "familiar with the text, legislative history, and implementation of the statute under review," then it would seem to follow that this reasonable observer understands the actual purpose of the challenged law (to the extent the actual purpose can be determined).<sup>125</sup> In *Walker*, the Court gives no weight to the purpose of the specialty license plate program. Justice Alito, in his dissent, points out that the majority ignores the plain fact that the Board of the Texas DMV had itself declared that the program was intended "'to encourage private plates' in order to 'generate additional revenue for the state.'"<sup>126</sup> Of course courts have a "duty . . . to 'distinguish[h] a sham secular

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<sup>117</sup> 515 U.S. 753, 757–60 (1995).

<sup>118</sup> *Id.* at 780 (O'Connor, J., concurring in part and concurring in the judgment).

<sup>119</sup> *Id.* at 780–81.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 800 n.5 (Stevens, J., dissenting).

<sup>122</sup> *Id.* at 799–800, 800 n.5.

<sup>123</sup> 545 U.S. 844, 866 (2005).

<sup>124</sup> See Smith, *supra* note 116, at 293–94.

<sup>125</sup> *Id.*

<sup>126</sup> *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2260 (2015) (Alito, J., dissenting) (quoting Resolution Denying Sons of the Confederate Veterans Specialty License Plate Application, Joint Appendix at 58, *Walker*, 135 S. Ct. 2239 (No. 14-144), 2014 WL 7498018, at \*58).

purpose from a sincere one,”<sup>127</sup> and at times this inquiry can be difficult, but it cannot be disputed that the government’s purpose for specialty license plates in *Walker* was to make money from the creation of a new expressive forum.

Because it is not clear who the reasonable observer is and precisely what background knowledge she might have, this test leads to uncertainty and unpredictability.<sup>128</sup> Indeed, prior to *Walker*, no fewer than six circuit courts held that the reasonable observer viewing specialty license plates would not consider the plates to be government speech.<sup>129</sup> These courts explained that a reasonable observer would know that the purpose of the specialty program is to raise money; that individuals and groups are permitted to propose a wide variety of plates; that drivers can choose whether to have one of the approved specialty license plates on their vehicles; and that it is unlikely that the state is attempting to communicate all the hundreds of messages offered on these plates.<sup>130</sup>

Notably, the only circuit court decision to hold that specialty license plates are government speech focused less on a reasonable observer inquiry and more on the government’s control of the speech.<sup>131</sup> Indeed, even Texas did not advance a reasonable observer argument before the Court, relying

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<sup>127</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O’Connor, J., concurring in the judgment)).

<sup>128</sup> Justice Breyer is well known for reaching different results in two cases that both involved the Ten Commandments on government property. *Compare* *Van Orden v. Perry*, 545 U.S. 677, 701–05 (2005) (Breyer, J., concurring in the judgment) (finding that a Ten Commandments display on Texas State Capitol grounds did not violate the Establishment Clause), *with* *McCreary*, 545 U.S. at 851, 857–58 (finding that a Ten Commandments display posted in courthouse violated the Establishment Clause, in opinion joined by Justice Breyer).

<sup>129</sup> *See, e.g.,* *Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009) (“[W]e now join the Fourth, Seventh and Ninth Circuits in concluding that a reasonable and fully informed observer would consider the speaker to be the organization that sponsors and the vehicle owner who displays the specialty license plate.”); *Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388, 394 (5th Cir. 2014) (“Here, the differences between permanent monuments in public parks and specialty license plates on the back of personal vehicles convince us that a reasonable observer would understand that the specialty license plates are private speech.”), *rev’d sub nom. Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015); *Children’s First Found., Inc. v. Fiala*, 790 F.3d 328, 338 (2d Cir.) (“[W]e have little difficulty concluding that such an observer would know that motorists affirmatively request specialty plates and choose to display those plates on their vehicles, which constitute private property.”), *opinion withdrawn and superseded on reh’g in part*, 611 F. App’x 741 (2d Cir. 2015). *But see* *ACLU of Tenn. v. Bredeisen*, 441 F.3d 370, 377 (6th Cir. 2006) (“[T]he medium in this case, a government-issued license plate that every reasonable person knows to be government-issued, a fortiori conveys a government message.”).

<sup>130</sup> *See* Gaylord, *supra* note 73, at 118.

<sup>131</sup> *See Bredeisen*, 441 F.3d at 375–76 (emphasizing government control over specialty license plates).

instead on the government's exercise of final editorial control.<sup>132</sup> It is quite possible that Texas did not advance a reasonable observer argument because it did not think it could win it.

One reason the *Walker* Court gives for its conclusion that a reasonable observer would believe the license plates contain government speech is that each license plate is "a government article" (i.e., government property) which the government owns and controls.<sup>133</sup> As an empirical matter, it is far from clear that this is correct. Although everyone knows the government issues license plates, many people do not realize that license plates remain government property even when they are affixed to a private vehicle. It is hard to say that this is an unreasonable misunderstanding.

Even if the reasonable observer would know that license plates are government property, it does not follow that they would assume that everything on license plates is the government's expression. The *Walker* Court declares that Texas uses the plates for identification purposes, and because Texas owns the plates and controls everything that appears on them, observers "routinely—and reasonably—interpret them as conveying some message on the [government's] behalf."<sup>134</sup> The Court appears to embrace what was only a suggestion in *Summum*—that the government's mere ownership of property has expressive value that would be obvious to the reasonable observer. The Court's willingness to accept this argument potentially turns the public forum doctrine on its head. As mentioned in Part I, the public forum doctrine rejected the traditional assumption that the government had the same property rights as private property owners to control the speech appearing on their property. The appearance of private speech on public property cannot be sufficient to convert that speech into government speech without eviscerating the public forum doctrine entirely.

Another leap of logic Justice Breyer makes without evidentiary support is his suggestion that "a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message."<sup>135</sup> Although other courts and commentators have made this same assertion,<sup>136</sup> it is not clear this is true.<sup>137</sup> Most specialty

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<sup>132</sup> See *Vandergriff*, 759 F.3d at 393 ("The Board . . . argues that speech is government speech when it is under the government's 'effective control.'").

<sup>133</sup> *Walker*, 135 S. Ct. at 2248.

<sup>134</sup> *Id.* at 2248–49 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 471 (2009)).

<sup>135</sup> *Walker*, 135 S. Ct. at 2249.

<sup>136</sup> See, e.g., *Higgins v. Driver & Motor Vehicle Servs. Branch*, 13 P.3d 531, 541 n.4 (Or. Ct. App. 2000) (en banc) (Wollheim, J., concurring) ("[T]he license plate bears the imprimatur of the state. Petitioner wants the state's endorsement of his message. . . . [A] bumper sticker would not satisfy petitioner's desire to have the state endorse the words he chooses to display."), *aff'd*, 72 P.3d 628 (Or. 2003); see also Norton, *supra* note 42, at 620 (arguing that those who use specialty license plates

license plate schemes give the organization requesting the creation of a specialty plate a portion of the proceeds of the plate.<sup>138</sup> Those who purchase the plate can express their support in an aesthetically pleasing manner. Bumper stickers are nowhere near as prevalent on cars anymore, perhaps because state specialty license plate programs have made it unnecessary to clutter up one's car with bumper stickers and endure the risk of damage to the car's paint. It is hardly clear that people who are willing to pay extra for such plates do so because they enjoy the state endorsement of their message. It is even less clear what assumptions the reasonable observer would make about why a car owner chooses a specialty license plate rather than a bumper sticker.

Justice Alito brilliantly attacks the majority's assumptions about the reasonable observer in his uncharacteristically clever dissent, where he asks rhetorically whether a reasonable observer who sees a specialty plate for another state's university believes that his state is endorsing a rival.<sup>139</sup> A perception of endorsement might be triggered only when she sees "offensive" speech on a specialty plate. Perhaps what is really going on in this case, then, is that some people who see a controversial message on a license plate might wonder, "Wow! I cannot believe Texas allows Confederate flags on its license plates." The more controversial the message, the more likely people will wonder why a state was permitting that message to appear.

In the Establishment Clause context, it is unclear whether the mythical reasonable observer "will have the perspective of one in the religious majority or religious minority, and whether the observer will have the perspective of an adherent or a nonadherent of the religion on display."<sup>140</sup> The same could be said of the reasonable observer asked to evaluate whether a particular message is government or private speech. Just as members of a religious majority are less likely to regard the presence of common religious symbols in public places as an endorsement of religion, individuals who embrace majoritarian views are less likely to regard noncontroversial expression on public property as containing a government

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instead of license plate frames or bumper stickers might "intend, and may be likely to achieve, the public's perception that the government endorses their views").

<sup>137</sup> See Jacobs, *supra* note 63, at 424–25 ("Groups that seek specialty plates are generally motivated by both their money-making potential and the recognition that they bring to the advertised cause. . . . Similarly, individuals who buy the plates do so both to help fund the identified organization or cause, and to publicly express their ideological support for it.").

<sup>138</sup> *Id.*

<sup>139</sup> *Walker*, 135 S. Ct. at 2255 (Alito, J., dissenting).

<sup>140</sup> Benjamin I. Sachs, *Whose Reasonableness Counts?*, 107 YALE L. J. 1523, 1526 (1998).



endorsement and are more likely to regard controversial or offensive speech as carrying the government's imprimatur.<sup>141</sup>

The Court offers no meaningful guidance for determining when observers reasonably attribute private expression to the government. *Walker* suggests that such conclusions are reasonable whenever speech appears on government property, but this cannot be correct. In several other cases, the Court has recognized that it is not always reasonable to attribute speech to a property owner, at least when the property owner is legally compelled to permit the speech.<sup>142</sup> In *Walker*, the Court does not even attempt to distinguish its prior compelled speech and association cases.<sup>143</sup> Arguably, a ruling against Texas in *Walker* would have demonstrated that states are legally compelled to provide equal access to its specialty license plate program. If Texas remained concerned that the public will not know about this constitutional requirement and would mistakenly continue to misattribute private speakers' messages to Texas, the state could engage in a clarifying public relations campaign.<sup>144</sup>

Putting aside all the foregoing criticisms regarding the Court's application of the reasonable observer test in *Walker*, a fundamental question remains: Is it either appropriate or necessary to use the same test to determine what constitutes government speech and what constitutes a

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<sup>141</sup> See Marshall, *supra* note 116, at 533 (“[T]he meaning of a symbol depends on the nature of its audience.” (citing Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 84–85 (1985))).

<sup>142</sup> See, e.g., *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65, 70 (2006) (dismissing First Amendment challenge to Solomon Amendment, explaining that even high school students (and certainly law students) “can appreciate the difference between speech a school sponsors and speech the school permits because [it is] legally required to do so, pursuant to an equal access policy” (first citing Bd. of Ed. of Westside Cmty. Sch. (Dist. 66) v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion); then citing *Mergens*, 496 U.S. at 268 (Marshall, J., concurring in judgment); and then citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995)); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 653–55 (1994) (rejecting cable providers' arguments that must-carry provisions amount to compelled speech in part because “[g]iven cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator”); *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 85–88 (1980) (rejecting compelled speech claim made by a California shopping mall that treated it like a public forum under the state constitution because the views of speakers at malls “will not likely be identified with those of the owner”). The Court's jurisprudence on compelled speech and the right of association is not a model of clarity. See Abner S. Greene, *(Mis)Attribution*, 87 DENV. U. L. REV. 833, 833–44 (2010) (observing that sometimes the Court's focus in compelled speech and association cases is the danger that the public will misattribute another's message to an individual or group, but in other cases misattribution is not the Court's primary concern). *Walker* does nothing to help cure this confusion.

<sup>143</sup> It is particularly strange that the Court ignored its compelled speech cases given that Texas's argument essentially is that it cannot be “compelled” to speak through its specialty license plate program.

<sup>144</sup> See Greene, *supra* note 142, at 850.

violation of the Establishment Clause? In the context of the government speech analysis, a reasonable observer's *mistaken* perception that the government endorses speech harms only the government's interests in distancing itself from messages it does not like. It does not undermine anyone's civil liberties; indeed, if anything, this expansion of the government speech doctrine threatens only the First Amendment rights of speakers who cannot express their messages on specialty license plates.<sup>145</sup> The expansion of the government speech doctrine to protect the government's interests in misattribution threatens to pervert the marketplace of ideas by allowing the government to prefer some speech over others.

Justice Thomas's decision to join Justice Breyer's opinion to form a majority is noteworthy, and not just because this particular lineup is extraordinarily rare. Some commentators have suggested that Justice Thomas's vote is based solely on the fact that he shares the liberal's distaste for the Confederate flag.<sup>146</sup> Because he did not write separately, it is hard to know what was behind his vote in this case.<sup>147</sup> Given that Justice Thomas has vehemently rejected the reasonable observer test in Establishment Clause cases,<sup>148</sup> it is a bit of a mystery why he would embrace such an inquiry in government speech cases.

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<sup>145</sup> It is worth emphasizing again that the decision in *Walker* was not based on the notion that the government has an interest in avoiding the appearance that it endorses hate speech specifically. See *supra* Introduction.

<sup>146</sup> Eugene Volokh and Erwin Chemerinsky disagree on this point. Compare Erwin Chemerinsky, *The Troubling Government Speech Doctrine*, AM. CONST. SOC'Y BLOG (June 19, 2015), <http://www.acslaw.org/acsblog/the-troubling-government-speech-doctrine> [perma.cc/4GPZ-BZU5] (suggesting Justice Thomas joined the majority because Confederate flags communicate an inherently hurtful message), with Eugene Volokh, *Justice Thomas's Vote in Walker v. Sons of Confederate Veterans*, WASH. POST. (June 24, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/24/justice-thomass-vote-in-walker-v-sons-of-confederate-veterans/> [perma.cc/J6PL-5VNZ] (arguing that Justice Thomas was not motivated by an inherent disdain for the Confederate flag, as he has protected racist speech in the past). Justice Thomas's subsequent dissent from the Court's denial of a petition for writ of certiorari in a case involving a challenge to a public transit advertising policy, where he expressed concern about "problematic content-based restrictions," Am. Freedom Def. Initiative v. King Cty., 136 S. Ct. 1022, 1025 (2016) (Thomas, J., dissenting from the denial of certiorari), makes it only more unclear why he joined the *Walker* majority.

<sup>147</sup> In *Virginia v. Black*, for example, Justice Thomas wrote a separate opinion explaining at great length the history and inherently threatening nature of cross burning. 538 U.S. 343, 388–94 (2003) (Thomas, J., dissenting).

<sup>148</sup> See, e.g., *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1838 (2014) (Thomas, J., concurring in part and concurring in the judgment) ("[T]here is no support for the proposition that the framers of the Fourteenth Amendment embraced wholly modern notions that the Establishment Clause is violated whenever the 'reasonable observer' feels 'subtle pressure,' or perceives governmental 'end[er]ment[ement]'.") (citations omitted).

### C. Control

The third factor on which Justice Breyer rests his majority opinion in *Walker* is Texas's exercise of "final approval authority" over the messages displayed on specialty plates.<sup>149</sup> A control element has appeared elsewhere in the Court's government speech cases, but the control required here is very minimal.

Standing alone, it is hard to imagine the Court ever holding that the state's exercise of ultimate control over the content of speech is sufficient for a finding of government speech. The government cannot claim immunity from First Amendment scrutiny for speech in a traditional public forum, for example, by demonstrating pre-speech review. Indeed, any such scheme would be a prior restraint, and prior restraints are presumptively unconstitutional.<sup>150</sup> Furthermore, a "control test" for government speech "could incentivize the government to increase its control over speech, thereby deem the speech its own, and then use its freedom from First Amendment constraints to discriminate against disfavored speakers and messages at will."<sup>151</sup>

Control plays a central role in the Court's decisions in *Johanns* and *Summum*. In *Johanns*, the Court found that promotional beef ads constituted government speech.<sup>152</sup> There, the challengers argued that the federal government could not claim the protections of the government speech doctrine because third-party nongovernmental actors were involved in creating the content.<sup>153</sup> The Court rejected this argument because the federal government "effectively control[s]" the message because it "sets the overall message to be communicated and approves every word that is disseminated."<sup>154</sup> It certainly makes sense to consider whether the government has established a particular program or platform for speech with the goal of communicating a particular message. It also makes sense that sometimes it will still be appropriate to conclude that the government is speaking when members of the public contribute content. But when the element of government control exists solely in the form of censoring speech pursuant to a vague and unprincipled "offensiveness" standard, the ugly specter of viewpoint discrimination is unavoidable.

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<sup>149</sup> *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2249 (2015) (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009)).

<sup>150</sup> *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975).

<sup>151</sup> *ACLU of N.C. v. Tennyson*, 815 F.3d 183, 188 (4th Cir. 2016) (Wynn, J., dissenting).

<sup>152</sup> *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 556–62 (2005).

<sup>153</sup> *Id.* at 560.

<sup>154</sup> *Id.* at 560–62.

Furthermore, *Walker*'s application of the control inquiry was troubling because Texas did not in fact exercise meaningful control over messages appearing on specialty license plates. Although Texas mentioned in its reply brief that it had rejected a handful of other specialty license plate applications,<sup>155</sup> the dissent points out that the precise details of these rejections remain unclear.<sup>156</sup> The Court noted that Texas's exercise of control informs the reasonable observer's understanding that license plates are government speech,<sup>157</sup> but given that Texas itself seemed unclear about when and under what circumstances it exercised this control,<sup>158</sup> it is impossible to believe third parties knew about it. The lack of selectivity should impact not only whether a reasonable observer believes the government is speaking but also the likelihood of meaningful government accountability. Because the actual operation of the Texas license plate program demonstrates that Texas will create specialty license plates for almost anyone who asks, the likelihood of the public understanding that some plates are rejected—much less the criteria for the Board's decisions—is slim.

#### D. Factors Discounted or Not Considered

In *Walker*, Justice Breyer conducts a proportionality inquiry in the guise of a three-part test.<sup>159</sup> He asserts that his opinion is just an application of the approach to the government speech doctrine in *Summum*,<sup>160</sup> but it is clear he is picking and choosing what factors from that case are relevant to him here.<sup>161</sup>

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<sup>155</sup> Reply Brief for the Petitioners at 9–10, *Walker*, 135 S. Ct. 2239 (2015) (No. 14-144), 2015 WL 1088969, at \*9–10.

<sup>156</sup> See *Walker*, 135 S. Ct. at 2260 (Alito, J., dissenting).

<sup>157</sup> *Id.* at 2248–49 (majority opinion).

<sup>158</sup> *Id.* at 2260 (Alito, J., dissenting).

<sup>159</sup> *Id.* at 2247 (majority opinion). Justice Breyer is not always transparent about his desire to abandon the Court's traditional doctrinal approaches. In *Entertainment Merchants*, for example, he asserted that it was appropriate to apply strict scrutiny, but stated he would not apply such scrutiny "mechanically." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2765 (2011) (Breyer, J., dissenting) (citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 841 (2000) (Breyer, J., dissenting)). In *Alvarez*, he purported to apply a form of intermediate scrutiny but focused on a proportionality approach that "examine[s] speech-related harms, justifications, and potential alternatives." *United States v. Alvarez*, 132 S. Ct. 2537, 2551–52 (2012) (plurality opinion) (Breyer, J., concurring in the judgment). According to Justice Breyer, this approach "take[s] account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so." *Id.* at 2251.

<sup>160</sup> *Walker*, 135 S. Ct. at 2248.

<sup>161</sup> Indeed, Justice Breyer indirectly recognizes as much at the beginning of *Walker*, where he summarizes the result in *Summum* as resting on three factors: the history of public monuments, the

In his *Walker* dissent, Justice Alito points out some of the factors the majority largely ignores or discounts. For example, Justice Alito argues that the majority fails to address the differences between the rejection of the monument in *Summum* and the rejection of the SCV specialty license plate application. Justice Alito protests that public parks have never “been thrown open for private groups or individuals to put up whatever monuments they desired.”<sup>162</sup> In addition, in *Summum* the spatial limitations of public parks rendered the application of the public forum doctrine unworkable; there are no such practical spatial problems present in the context of specialty license plates because the government can issue an unlimited number of plates.<sup>163</sup>

The *Walker* majority suggests the public forum doctrine is unworkable in the context of specialty license plates because Texas would have to accept license plates not just with Confederate flags but other unappealing messages, like one supporting al Qaeda,<sup>164</sup> and Texas would likely rather stop the program than do that. To be fair, *Summum* gave mixed messages on this sort of unworkability inquiry. Near the end of his majority opinion in that case, Justice Alito essentially makes a confession that “[t]he obvious truth of the matter is that if” the Court decided that the government had to accept permanent monuments on a viewpoint-neutral basis, “most parks would have little choice but to refuse all such donations.”<sup>165</sup> It is not unreasonable to read this portion of the opinion as suggesting that a forum analysis does not apply whenever the government would rather close a forum than be forced to endorse offensive messages. This is the reading Justice Breyer appears to embrace in *Walker*.

Another possibility, however, is that in *Summum* the Court was simply recognizing that as a practical matter, parks cannot accommodate many permanent monuments, and as a result, the government must be able to make some choices. By rejecting this approach to the “unworkability” inquiry, *Walker* suggests a wide variety of government platforms for expression will constitute government speech because in many instances the government would prefer to close them than embrace a diversity of viewpoints. Notably, the majority also fails to consider the possibility of content-neutral alternatives that might solve this alleged unworkability

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understanding of reasonable observers, and the city’s control over the monuments. *Id.* at 2247. He then states that “[i]n light of these and a few other relevant considerations, the Court concluded that the expression at issue was government speech.” *Id.* (emphasis added).

<sup>162</sup> *Id.* at 2259 (Alito, J., dissenting).

<sup>163</sup> *See id.* at 2259–61.

<sup>164</sup> *Id.* at 2249 (majority opinion).

<sup>165</sup> *Pleasant Grove City v. Summum*, 555 U.S. 460, 480 (2009).

problem.<sup>166</sup> This is particularly striking given the lengthy discussion of alternatives in *Reed v. Town of Gilbert*, which the Court decided on the very same day as *Walker*.<sup>167</sup>

Justice Alito also criticizes the majority for largely discounting the for-profit nature of the specialty license plate program. Unlike any other government speech case before *Walker*, the Texas specialty plate program requires people to pay the state for the privilege of displaying one of these plates on their cars.<sup>168</sup> Justice Alito notes that the fees Texas collects for specialty license plates far exceed the cost of their issuance.<sup>169</sup> Justice Breyer responds that “the existence of government profit alone is insufficient to trigger forum analysis,” noting that the existence of maintenance fees would not have changed the outcome in *Summum*.<sup>170</sup> This might well be correct, but it ignores the host of other factors that were crucial to the outcome in *Summum* (namely, the long tradition of permanent government monuments and the unworkability of the public forum doctrine in that context). Furthermore, this argument ignores the real possibility that the spending of government funds and resources to support third-party expressive activities is more likely to attract political attention and promote the sort of accountability that is at the heart of the government speech determination.

Another problem with the government speech doctrine after *Summum* and *Walker* is that the government is not required to articulate any particular message. The Court first expressly rejected any such requirement in *Summum*, where Justice Alito waxed eloquently for the Court about how the meaning of public monuments is potentially different for each observer and changes over time.<sup>171</sup> Although it may not be possible to declare definitively what message a permanent government monument is intended to express, the wide variety of the over 400 Texas specialty license plates indicates that the government has no message at all.<sup>172</sup>

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<sup>166</sup> In *ACLU of North Carolina v. Tata*, the Fourth Circuit called North Carolina’s similar unworkability argument “[m]elodrama[ti]c” and suggested that requiring at least 300 people to support a proposed plate should weed out frivolous plates, or, if that did not work, the state could stay out of controversial issues entirely. 742 F.3d 563, 575 (4th Cir. 2014).

<sup>167</sup> 135 S. Ct. 2218, 2232 (2015) (“The Town has ample content-neutral options available to resolve problems with safety and aesthetics.”).

<sup>168</sup> *Walker*, 135 S. Ct. at 2261 (Alito, J., dissenting).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 2252 (majority opinion).

<sup>171</sup> See *Pleasant Grove City v. Summum*, 555 U.S. 460, 474–77 (2009).

<sup>172</sup> Corbin, *supra* note 42, at 643 (“[T]he sheer number of specialty license plates offered makes it difficult to convincingly posit that any specific message is being promoted.”).

When the public does not know what the government is saying, accountability through the political process is highly unlikely.<sup>173</sup> What the government means to say when it rejects an application to include private speech on government property potentially makes it even more unclear what the government's message is. In *Walker*, it was clear that SCV's plate was rejected because its logo was "offensive" to the public, but nothing in the Court's opinion requires state actors to be clear about the reasons for rejection in the future in order to take advantage of the protections of the government speech doctrine.<sup>174</sup>

Because Texas does not exercise any meaningful selectivity over the specialty license plates it chooses, the program appears to be some sort of forum like the one in *Rosenberger*, where the university did not "speak or subsidize . . . a message it favors but instead expends funds to encourage a diversity of views from private speakers."<sup>175</sup> By rejecting the SCV plate, Texas appears to be doing nothing but blatantly and impermissibly "manipulating private expression" in a viewpoint-based manner.<sup>176</sup>

In *Walker*, the Court concludes that just as private individuals cannot be compelled to support the speech of the government, the government should not be compelled to support the speech of private individuals.<sup>177</sup> This sounds like the Court is holding that the government has First Amendment rights just like individuals.<sup>178</sup> This is strange. Unlike private parties, the government is in fact legally required to support the speech of

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<sup>173</sup> See Timothy Zick, *Summum, the Vocality of Public Places, and the Public Forum*, 2010 BYU L. REV. 2203, 2217 (2010). ("If the municipality is not required to identify a particularized message, how are the people to know whether to be offended and object, to agree with the government's sentiment, or simply to ask for clarification?").

<sup>174</sup> *Id.* at 2218 (arguing that governments can speak through exclusion, but that it is not always clear "what message rejection conveys absent some explanation from officials."). In *Walker*, the government message was particularly muddled because the state has given mixed messages about the Confederate flag. For example, the Texas State Capitol contains a number of monuments honoring Confederate soldiers, and the Confederate flag can be found for sale in the official state capitol gift shop. Respondents' Brief on the Merits at 11, *Walker*, 135 S. Ct. 2239 (No. 14-144), 2015 WL 575158, at \*11. In some cases, this type of inconsistency makes the Court reluctant to find government speech. See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 569-70 (2005) (Ginsburg, J., concurring in the judgment) (noting her reluctance to label the beef advertisements at issue as government speech given the conflicting messages about healthy eating that "the Government conveys in its own name").

<sup>175</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995).

<sup>176</sup> Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 577 (1996).

<sup>177</sup> 135 S. Ct. at 2253.

<sup>178</sup> See Gey, *supra* note 43, at 1259, 1262-63 (questioning the Court's decision to grant the government "a First Amendment right to speak," including the ability to silence or coerce the rights of its critics).

private individuals all the time under the public forum doctrine.<sup>179</sup> Whether it is in the form of land or money, the government cannot engage in viewpoint discrimination among speakers, even though some people might reasonably but mistakenly believe that the government is supporting private expression.

### III. RAMIFICATIONS

The ramifications of *Walker* are potentially staggering. Using this decision as a guide, the government will likely assert the government speech doctrine in a wide variety of contexts in order to justify content-based and even viewpoint-based censorship of private speech.

Even before *Walker*, lower courts tended to give the government a wide berth to restrict speech. As Helen Norton put it in a provocatively titled article, *Imaginary Threats to Government's Expressive Interests*, courts often appear overly concerned about protecting the government's ability to distance itself from speech it does not like.<sup>180</sup> These restrictions extend from the exclusion of individuals from government events,<sup>181</sup> restrictions on the speech of public school teachers and students,<sup>182</sup> the censorship of government employees generally,<sup>183</sup> and advertisements in public transportation.<sup>184</sup> *Walker* will make it even easier for the government to claim that private speech is actually its own speech.

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<sup>179</sup> See Lyrisa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 2008 (2011) (“[The] [p]ublic forum doctrine acts as a government subsidy for speech.” (citing Rebecca Tushnet, *Domain and Forum: Public Space, Public Freedom*, 30 COLUM. J.L. & ARTS 597, 600 (2007))).

<sup>180</sup> Helen Norton, *Imaginary Threats to Government's Expressive Interests*, 61 CASE W. RES. L. REV. 1265, 1265 (2011).

<sup>181</sup> In *Weise v. Casper*, 593 F.3d 1163 (10th Cir. 2010), the Tenth Circuit rejected a First Amendment challenge to the plaintiff's removal from the audience during a 2005 speech from President Bush, pursuant to an official policy “excluding those who disagree with the President from the President's official public appearances.” *Id.* at 1165. The court ruled in favor of the defendants on qualified immunity grounds without reaching the merits of the underlying claim. *Id.* at 1170. The court explained that it was not clear whether the President could be compelled to permit a dissenter from attending his speech. *Id.* (citing *Sistrunk v. City of Strongsville*, 99 F.3d 194, 199 (6th Cir. 1996) (upholding exclusion of individual from Bush–Quayle campaign rally)).

<sup>182</sup> For an extensive discussion of the First Amendment rights of K-12 public school teachers and students, see Mary-Rose Papandrea, *Social Media, Public School Teachers, and the First Amendment*, 90 N.C. L. REV. 1597 (2012), and Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027 (2008).

<sup>183</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006) (suggesting that its holding that public employees performing their job duties have no First Amendment rights is based on the government speech doctrine, as it “simply reflects the exercise of employer control over what the employer itself has commissioned or created”). For a more extensive discussion of the First Amendment rights of government employees, see Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010 BYU L. REV. 2117 (2010).

<sup>184</sup> *Seattle Mideast Awareness Campaign v. King Cty.*, 781 F.3d 489, 502–03 (9th Cir. 2015).



The dissent warns of some of the ramifications of the majority's expansive government speech doctrine. Justice Alito asks whether the government could now make viewpoint-based decisions about the content to appear on a government-controlled electronic billboard, simply because it controls it and owns it.<sup>185</sup> Even worse, he warns, "[w]hat if a state college or university did the same thing with a similar billboard or a campus bulletin board or dorm list serve? What if it allowed private messages that are consistent with prevailing views on campus but banned those that disturbed some students or faculty?"<sup>186</sup> These concerns are well taken. *Walker* solidifies the suggestion in *Board of Regents of the University of Wisconsin System v. Southworth* that the Court will consider a university to be the speaker in cases where "the challenged speech [is] financed by tuition dollars and the University and its officials were responsible for its content."<sup>187</sup> After *Walker*, "responsibility" for content can be simply the exercise of final censorship authority; *Walker* does not require the government to be involved in any way with the development of the speech.

Justice Alito's comments reflect very legitimate concerns about the scope of *Walker*'s expansive conception of the government speech doctrine, limited only by a weak historical inquiry, an easily met ultimate control requirement, and a highly uncertain and malleable reasonable observer test that rests in large part upon the first two factors. As Part II.A argues, Justice Breyer's history requirement will be no obstacle to claims that speech on public property is government speech. This prong does not require courts to inquire whether the government had the purpose to create a forum for private speech; as long as the government has exercised at least some control over the forum, it does not matter if it has not, in reality, exercised control over all of it. The control requirement will be even more easily met. After *Walker*, government actors will be wise to the need to assert control not over the development of the expressive content but merely final approval authority. Governments will be thrilled to censor speech if doing so perversely insulates them from constitutional challenges.

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<sup>185</sup> *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2256 (2015) (Alito, J., dissenting).

<sup>186</sup> *Id.* Others sounded this same alarm bell after *Summum*. See, e.g., Zick, *supra* note 173, at 2229 ("Under *Summum*'s identity conception, governmental entities could claim that parks, streets, classrooms, museums, subway platforms, university campuses, municipal buildings, public meetings, municipal websites, and other places are not public forums but tangible expressions of a governmental identity or image. Any private speech that is not consistent with that preferred image or identity would be subject to exclusion under the government speech principle."). Indeed, some warned of this potential expansion long before that. See, e.g., Bezanson & Buss, *supra* note 29, at 1443 (noting the possibility that the government could recharacterize the awarding of parade permits as an exercise of editorial discretion).

<sup>187</sup> 529 U.S. 217, 229 (2000).

Finally, after *Walker*, courts will be reluctant to use a reasonable observer test to reject a government speech defense when the history and control factors indicate otherwise.

*Walker* is potentially dangerous because it will give the government much greater ability to restrict private speech whenever the government wants to avoid the appearance that it endorses it. As long as the government exercises control and a reasonable person might mistakenly attribute the speech to the government, the government speech doctrine potentially applies. For example, just two weeks after the Court released *Walker*, a federal district court judge relied on it to reject a First Amendment challenge to the government's decision to cancel the registration of the "Redskins" trademark under the Lanham Act's "may disparage" provision.<sup>188</sup> The court explained that trademark registration "communicates the message that the federal government has approved the trademark"; "the public closely associates federal trademark registration with . . . the federal government's recognition of the mark"; and the federal government exercises final authority to determine which marks to recognize.<sup>189</sup> Arguably this case is not equivalent to *Walker* because it does not obviously implicate the public forum doctrine. Instead, it feels more like an unconstitutional conditions case. After *Open Society*, it might appear that the government would have to demonstrate some connection between its viewpoint-based discrimination and the trademark benefit. It would be difficult for the government to meet this burden. However, if *Walker* governs a broader range of government speech cases—and at least one federal district court judge thinks it does—then the much more easily met three-part *Walker* test applies.

*Walker* may also impact the ability of municipalities to limit advertisements on public transportation. Courts around the country have been grappling with the constitutionality of restrictions on controversial advertisements.<sup>190</sup> In *Lehman v. City of Shaker Heights*, the Supreme Court

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<sup>188</sup> *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439, 447, 454 (E.D. Va. 2015); see 15 U.S.C. § 1052(a) (2012). The Federal Circuit has since held that the issuance of trademarks is not government speech and the "may disparage" provision of § 1052 violates the First Amendment. In re Tam, 808 F.3d 1321, 1345–46, 1357–58 (Fed. Cir. 2015) (en banc).

<sup>189</sup> *Blackhorse*, 112 F. Supp. 3d at 458–59.

<sup>190</sup> See, e.g., *Seattle Mideast Awareness Campaign v. King Cty.*, 781 F.3d 489, 503 (9th Cir. 2015) (dismissing First Amendment challenge to rejection of advertisement opposing U.S. support for Israel, as the decision was reasonable and viewpoint neutral); *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571, 573–77 (1st Cir. 2015) (rejecting challenge to advertising policy rejecting "demeaning" or "disparaging" ads); *Coleman v. Ann Arbor Transp. Auth.*, 904 F. Supp. 2d 670, 691–96 (E.D. Mich. 2012) (holding unconstitutional transit advertising policy prohibiting ads that are not "in good taste" or that "defame[] or [are] likely to hold up to scorn or ridicule a person or group of persons"). In March 2016, the Supreme Court denied a petition for a writ of certiorari in a case

upheld a public transit advertising policy that prohibited political advertising.<sup>191</sup> This decision long predated the emergence of the government speech doctrine, but one reason the Court's plurality gave for upholding a policy that excluded all political speech was to avoid "the appearance of favoritism."<sup>192</sup> Justice Brennan's dissent criticized the majority for accepting this argument: "The endorsement of an opinion expressed in an advertisement on a motor coach is no more attributable to the transit district than the view of a speaker in a public park is to the city administration or the tenets of an organization using school property for meetings is to the local school board."<sup>193</sup> *Lehman* is therefore not inconsistent with the application of the government speech doctrine to public transit advertising restrictions.<sup>194</sup>

To be sure, *Walker* specifically distinguished specialty license plates from advertising space on city buses, noting that in *Lehman* "the messages were located in a context (advertising space) that is traditionally available for private speech," and this space "bore no indicia that the speech was owned or conveyed by the government."<sup>195</sup> But this effort to distinguish *Lehman* is dicta, and it is not particularly convincing. All three prongs of the new *Walker* test are arguably met in the context of public transit advertising. It is doubtful that specialty license plates have existed significantly longer than advertising on public transportation. As with license plates, municipalities have long used spaces on and surrounding its public transportation systems to communicate government messages and more recently opened up these spaces to private speakers as a way of making money. Observers would certainly understand that the walls of a bus or a train are government property, and it is hard to say it is any less reasonable than it was in *Walker* for them to assume—mistakenly—that the

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involving advertising restrictions in a municipal transit system. *Am. Freedom Def. Initiative v. King Cty.*, 136 S. Ct. 1022 (2016) (Thomas, J., dissenting from the denial of certiorari). Justice Thomas, joined by Justice Alito, dissented from this denial, arguing that the "case offers an ideal opportunity to bring clarity to an important area of First Amendment law." *Id.* at 1023. Justice Thomas contended that King County's advertising policy contained "problematic content-based [speech] restrictions"; although some regard the speech at issue offensive, he noted "[t]hat is all the more reason to grant review." *Id.* at 1025.

<sup>191</sup> 418 U.S. 298, 299–304 (1974) (plurality opinion).

<sup>192</sup> *Id.* at 304.

<sup>193</sup> *Id.* at 321 (Brennan, J., dissenting) (quoting *Wirta v. Alameda-Contra Costa Transit Dist.*, 434 P.2d 982, 989 (Cal. 1967)).

<sup>194</sup> See *Women's Health Link, Inc. v. Fort Wayne Pub. Transp. Corp.*, 155 F. Supp. 3d 843, 850 (N.D. Ind.) (finding that a public bus advertising program "involves neither government speech nor a public forum"), *rev'd*, 826 F.3d 947 (7th Cir. 2016); *Coleman*, 904 F. Supp. at 696–97 (rejecting argument that bus advertisements are government speech).

<sup>195</sup> *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2252 (2015).

government endorsed any message posted on those walls. Finally, most municipalities would be able to demonstrate that they have exercised just as much if not greater control over the approval of advertisements than Texas exercises over the approval of specialty license plates.

*Walker* may have the most dramatic impact on the free speech rights of government employees and public school students. In both of these contexts, the scope of the government's power to restrict speech is somewhat unclear. In the context of public school student speech rights, for example, the Court decided in *Hazelwood* that public schools could restrict speech for legitimate pedagogical reasons when such speech bore the "imprimatur" of the school.<sup>196</sup> Lower courts have relied extensively on *Hazelwood* to determine the First Amendment rights of students at both the secondary and higher education levels.<sup>197</sup> Under the government speech doctrine established in *Walker*, the determination of whether speech bears the "imprimatur" of the school will depend on the perspective of the reasonable person looking at the relevant history and government control of the type of expressive activity at issue. Given that schools have historically at least tried to exercise control and final approval authority over student speech, *Walker* makes it easier to conclude that a reasonable person would think that the student speaks for the school. Again, the more offensive the speech, the more likely the reasonable person will think that the school is tolerating and thereby endorsing the speech, rather than simply recognizing that students enjoy constitutional rights, too.

This is not fanciful speculation. Indeed, schools have already been making these sorts of arguments. For example, a district court in Alabama recently held that the University of South Alabama could limit a student group's right to engage in a pro-life protest on the campus perimeter because "the University could reasonably believe that authorizing student

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<sup>196</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271–73 (1988).

<sup>197</sup> See, e.g., *Doe v. Silsbee Indep. Sch. Dist.*, 402 F. App'x 852, 855 (5th Cir. 2010) (citing *Hazelwood* for support in rejecting high school cheerleader's claim that she should not be required to cheer for her alleged attacker, the court explained that "[i]n her capacity as cheerleader, [she] served as a mouthpiece through which SISD could disseminate speech—namely, support for its athletic teams"); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1286–92 (10th Cir. 2004) (using *Hazelwood* to analyze a student's argument that she had a First Amendment right not to say words she found offensive). For an extensive discussion of the use of *Hazelwood* to justify speech restrictions in educational settings, see Emily Gold Waldman, *University Imprimaturs on Student Speech: The Certification Cases*, 11 FIRST AMEND. L. REV. 382 (2013); Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 73–90 (2008) (observing that courts have not only "invoked *Hazelwood* in a tremendous array of student speech cases, in almost every conceivable context from kindergarten through high school," but also have extended its reach to "teachers' classroom speech, outside-entity speech, and speech that reflects district-level decisions about textbooks and curricula").

speech in the Perimeter concerning divisive issues risked public perception that it endorsed or approved of the viewpoints there expressed.”<sup>198</sup> Rejecting the plaintiff’s arguments that the protection of free speech is essential in a university setting, the court instead embraced the defendant’s argument that “the free exchange of ideas is enhanced when the government does not place its imprimatur on one set of ideas.”<sup>199</sup> The court found that controversial student speech appearing on the portions of university property that are “most exposed to direct observation by the general public” threatened this legitimate interest in neutrality.<sup>200</sup> Although the court did not rely explicitly on *Walker*, its reliance on a reasonable observer inquiry suggests the holding is consistent with that case.<sup>201</sup>

In other cases, universities have expressly relied on *Walker* to argue that they can discriminate on the basis of viewpoint among student groups.<sup>202</sup> Iowa State University (ISU), for example, relied on *Walker* when arguing that it should be permitted to engage in viewpoint-based decisions when determining which groups to license its trademark. ISU contended that “it uses the trademarks to promote the ISU brand, which it uses to attract prospective students, garner public and private funding, and recruit employees.”<sup>203</sup> ISU claimed reasonable observers “believe ISU licenses its marks to convey its preferred views,” citing as proof the public backlash to the use of the trademark by a student group favoring the legalization of marijuana.<sup>204</sup> The court rejected the university’s government speech argument, but not without some difficulty. The court conceded that trademarks “are frequently used to associate a product or image with the mark’s owner,” but noted ISU failed to present sufficient evidence in the record that the general public believed ISU promoted the marijuana legal

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<sup>198</sup> *Students for Life USA v. Waldrop*, No. CV 14-0157-WS-B, 2016 WL 707028, at \*15 (S.D. Ala. Feb. 22, 2016). The court cited an Eleventh Circuit opinion that also relied explicitly on *Walker* to conclude that a reasonable observer would believe that a school endorsed banners for school sponsors hanging on secondary schools’ fences. *Id.* at \*15 (citing *Mech v. Sch. Bd. of Palm Beach Cty.*, 806 F.3d 1070, 1076–78 (11th Cir. 2015)).

<sup>199</sup> *Waldrop*, 2016 WL 707028, at \*14.

<sup>200</sup> *Id.*

<sup>201</sup> Disturbingly, when discussing the understanding of the general public, the court assumed that “[w]hile this group will include persons with a[n] . . . understanding of the relevant concepts” from high school civics that a school does not endorse or support student speech, it merely permits it on a nondiscriminatory basis, “it will also include persons never adequately exposed to them and those whose grasp of them has faded.” *Id.* at \*15.

<sup>202</sup> See, e.g., *Gerlich v. Leath*, 152 F. Supp. 3d 1152, 1175–76 (S.D. Iowa) (rejecting Iowa State University’s argument that it could deny a trademark license to a student group in favor of the legalization of marijuana under *Walker* because reasonable observers would know the history of “universities as incubators for intellectual experiment and exploration”), *appeal filed*, (Mar. 1, 2016).

<sup>203</sup> *Id.* at 1174.

<sup>204</sup> *Id.*

reform.<sup>205</sup> Surely the next university making a government speech argument will make sure to present such evidence. The court also begrudgingly noted that *Walker*'s "effective control" element was satisfied because ISU exercised final approval authority.<sup>206</sup> The court discounted the importance of this factor and concluded that because "American society regards its universities as incubators for intellectual experiment and exploration," observers would not associate ISU with the views of all of its student groups.<sup>207</sup> Note the obvious tension between this assumption of what a reasonable person understands about the role of universities in fostering free speech and the very different "neutrality" approach the court took in the University of South Alabama case.

*Walker* will potentially have the most significant impact on student athletes who might otherwise challenge restrictions on their ability to use social media or communicate with the press. These bans have come into place after student athletes have posted disparaging remarks about their teammates, coaches, or opposing teams; pictures of underage drinking or other inappropriate behavior; or apparent violations of NCAA's rules.<sup>208</sup> For example, the University of North Carolina (UNC) Department of Athletics' official policy for student athletes now specifically requires that a coach or administrator must have access to, monitor, or receive reports about all student athlete social media accounts.<sup>209</sup> The UNC policy makes clear that UNC is not simply looking for potential NCAA violations; it warns student athletes that playing for UNC "is a privilege, not a right" and that "[a]s a student-athlete, you represent the University and you are expected to portray yourself, your team, and the University in a positive manner at all times."<sup>210</sup> Many other universities have similar social media

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<sup>205</sup> *Id.* at 1175.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 1175–76.

<sup>208</sup> See John Browning, *Universities Monitoring Social Media Accounts of Student-Athletes: A Recipe for Disaster*, 75 TEX. B.J. 840, 840–43 (2012) ("In Orwellian fashion, college and university athletic departments across the country are mandating that competing in varsity sports comes with a hefty price tag: one's right to privacy and the protections afforded by the First, Fourth, and Fourteenth Amendments to the U.S. Constitution."); Jimmy Sanderson, *To Tweet or Not to Tweet: Exploring Division I Athletic Departments' Social-Media Policies*, 4 INT'L J. SPORTS COMM. 492, 493 (2011), [http://journals.humankinetics.com/AcuCustom/Sitename/Documents/DocumentItem/08\\_Sanderson%20IJSC\\_2011\\_0016\\_p492-513.pdf](http://journals.humankinetics.com/AcuCustom/Sitename/Documents/DocumentItem/08_Sanderson%20IJSC_2011_0016_p492-513.pdf) [<https://perma.cc/BQZ4-YC9G>]; Frank B. Butts, *NCAA Athletes and Facebook*, 11 SPORT J. (2008), <http://go.galegroup.com/ps/i.do?id=GALE%7CA210520254&v=2.1&u=northwestern&it=r&p=AONE&sw=w&asid=d835d5e928a35a2eeb1f761bc15f36ad> [<https://perma.cc/EV4W-ZH5D>].

<sup>209</sup> THE UNIV. OF N.C. AT CHAPEL HILL DEP'T OF ATHLETICS, POLICY ON STUDENT-ATHLETE SOCIAL NETWORKING AND MEDIA USE (2012), <http://www.goheels.com/fls/3350/pdf/Compliance/SocialNetworkingPolicy.pdf?SPID=111196> [<https://perma.cc/832F-XA9C>].

<sup>210</sup> *Id.*

bans and monitoring policies in place for their athletes.<sup>211</sup> These new policies arguably satisfy *Walker*'s control element. The only question is whether a reasonable person thinks these students are speaking for the school. Many reasonable people believe that student athletes on high-profile teams such as basketball and football are public figures who represent the school, and that therefore schools should not be required to tolerate communications that embarrass the team and the school. After *Walker*, the exercise of control, which in turn informs the fictional reasonable observer, suggests this belief is reasonable.<sup>212</sup>

Like public school students, government employees are also likely to find themselves with even less protection for their speech activities after *Walker*. As discussed in Part I, the Court has indicated that the government speech doctrine applies to any speech in which an employee engages in while within the scope of her job duties. As with students, courts might read *Walker* as providing governments with the power to restrict the "off-duty" speech of its employees as long as a reasonable observer might believe that the employer's willingness to tolerate the offensive speech is equivalent to endorsing the speech. Public school teachers, for example, are frequently punished for their offensive "off-duty" speech.<sup>213</sup>

It is easy to criticize *Walker* and lament its implications; it is harder to offer an alternative approach. But *Open Society*'s focus on the connection between the speech restriction and the contours of the government program offers a promising approach for the government speech doctrine as a whole. Rather than focusing on simply whether the government is controlling speech and whether the reasonable person would think the government has endorsed private speech, the *Open Society* inquiry would cabin in an otherwise overly expansive government speech doctrine so that it applies only when there is a close connection between the speech restriction and the purposes of the government program at issue. In the

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<sup>211</sup> See Kayleigh R. Mayer, *Colleges and Universities All Atwitter: Constitutional Implications of Regulating and Monitoring Student-Athletes' Twitter Usage*, 23 MARQ. SPORTS L. REV. 455, 471–72 (2013) (discussing social media policies for student athletes around the country).

<sup>212</sup> The "history" inquiry would arguably support the students, given that schools have not historically subjected the speech of their student athletes to such rigorous control and monitoring. It depends, however, on how a court would frame the relevant historical inquiry. Schools have generally exercised control over their student athletes' social media accounts for most (albeit not all) of their existence. Furthermore, given the relative youth of social media as a communications platform, some courts are likely to discount the history prong entirely. See, e.g., *Mech v. Sch. Bd. of Palm Beach Cty.*, 806 F.3d 1070, 1075–76 (11th Cir. 2015) (discounting a lack of history of advertising banners on fences at public schools, reasoning that a lack of history "is not a prerequisite for government speech") (emphasis in original).

<sup>213</sup> For a detailed discussion of the free speech rights of public school teachers, see Papandrea *Social Media*, *supra* note 182.

context of specialty license plates, the Court should have recognized that the primary purpose of the specialty license program is to serve as a fundraising program. Although other specialty license plate cases may present closer calls, particularly where the legislatures themselves authorize the creation of plates, it is plain that Texas was not using the hundreds of specialty license plates to proclaim a particular government message or to promote a particular government objective.

The government is not a private entity entitled to protect its brand from dilution. Under well-established First Amendment principles, the government is required to support the speech of private speakers. A focus on reasonable observers who erroneously believe this tolerance operates as endorsement threaten the future of free speech rights in this country.

#### CONCLUSION

*Walker* is likely to have much more far-reaching effects than the seemingly trivial issue of specialty license plates. By permitting the government to defeat First Amendment claims based on the easily satisfied three-part test the Court embraced in *Walker*, the Court raises the potential for an expansive government speech doctrine that defeats First Amendment rights in a wide variety of settings. Requiring a connection between the speech restriction and the government program is one promising approach to limiting this dangerous doctrine.